(86)

Supreme Court, U.S.
FILED
FEB 18 2003
CLERK

No. 02-241

IN THE

Supreme Court of the United States

BARBARA GRUTTER,

Petitioner,

v.

LEE BOLLINGER, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR INDIANA UNIVERSITY AS *AMICUS CURIAE* SUPPORTING RESPONDENTS

DOROTHY J. FRAPWELL
University Counsel
INDIANA UNIVERSITY
Bryan Hall 211
107 South Indiana Avenue
Bloomington, IN 47405-7000
(812) 855-9739

PATRICK LOUIS BAUDE
LAUREN K. ROBEL
JEFFREY EVANS STAKE
INDIANA UNIVERSITY SCHOOL
OF LAW – BLOOMINGTON
211 South Indiana Avenue
Bloomington, IN 47405-7001
(812) 855-8885

JAMES FITZPATRICK
Counsel of Record
JAMES L. COOPER
MICHAEL R. GESKE
ELISSA J. PREHEIM
KENDALL MILLARD
ARNOLD & PORTER
555 Twelfth Street, N.W.
Washington, DC 20004-1206
(202) 942-5000

Counsel for Amicus Curiae

179174

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

BEST AVAILABLE COPY

29 pp

TABLE OF CONTENTS

	Page
Table of Cited Authorities	iii
Interest of Indiana University	1
Statement	2
Summary of Argument	3
Argument	5
I. The Interest Of Government-Funded Schools In The Diversity Of Their Student Body Is Constitutionally Furthered By The Competitive Consideration Of Race And Ethnicity In Admission Decisions.	5
A. The Interest of IU School of Law in Diversity is Constitutionally Protected.	5
B. Consistent Minority Enrollment, Standing Alone, Does Not Constitute or Prove the Use of a *De Facto* Quota.	11
II. IU School Of Law Requires The Discretion Permitted By *Bakke* To Meet Its Academic Mission.	13

Contents

		Page
A.	Courts Should Not Substitute Their Judgment in the Place of Lawful Decisions by Faculty Admissions Committees.	14
B.	IU School of Law's Admissions Process Is Narrowly Tailored To Achieve Diversity.	16
C.	Race-Neutral Admissions Policies Would Fail to Meet the School's Compelling Interest in Diversity.	17
III.	The Diversity Furthered By IU School Of Law's Admissions Policy Confers Significant Benefits Upon Its Students, The Bar, And The State.	18
Conclusion		22

TABLE OF CITED AUTHORITIES

Cases:	Page
Adarand Constructors, Inc. v. Pena, 515 U.S. 200 (1995)	5
Brewer v. W. Irondequoit Cent. Sch. Dist., 212 F.3d 738 (2d Cir. 2000)	6, 14
Eisenberg v. Montgomery County Pub. Sch., 197 F.3d 123 (4th Cir. 1999), *cert. denied*, 529 U.S. 1019 (2000)	10
Hopwood v. State of Tex., 78 F.3d 932 (5th Cir.), *cert. denied*, 518 U.S. 1033 (1996)	11
Hunter v. Regents of Univ. of Cal., 190 F.3d 1061 (9th Cir. 1999)	6
Planned Parenthood of Southeastern Penn. v. Casey, 505 U.S. 833 (1992)	14
Regents of Univ. of Mich. v. Ewing, 474 U.S. 214 (1985)	14, 15
Smith v. Univ. of Wash. Law Sch., 233 F.3d 1188 (9th Cir. 2000), *cert. denied*, 532 U.S. 1051 (2001)	6, 14
Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1 (1971)	7

Cited Authorities

Page

Sweatt v. Painter, 339 U.S. 629 (1950) 19

University of Cal. Regents v. Bakke, 438 U.S. 265 (1978) ..... *passim*

Wygant v. Jackson Bd. of Educ., 476 U.S. 267 (1986) 6

Statutes:

Ind. Code § 33-2.1-12-2 (1997) 20

Ind. Code § 33-2.1-12-7 (1997) 20

Miscellaneous:

Admission Quick Start, <http://www.law.indiana.edu/prospective/quick.shtml> (last visited Feb. 16, 2003) 8, 9

Indiana Judicial System, <http://www.in.gov/judiciary/cleo/history.html (last visited Feb. 17, 2003) 20

Indiana State Bar Association, <http://www.inbar.org/content/commitees/standing/oppminorities.asp> (last visited Feb. 16, 2003) 21

Cited Authorities

Page

Sherri Massa, *Bar Affirms Diversity as Core Value*, <http://www.indybar.org/newslettermain.cfm?ID=132> (last visited Feb. 14, 2003) 21

Gary Orfield & Dean Whitla, *Diversity and Legal Education: Student Experiences in Leading Law Schools*, *in* DIVERSITY CHALLENGED: EVIDENCE ON THE IMPACT OF AFFIRMATIVE ACTION 143-174 (Gary Orfield & Michal Kurlaender eds., 2001) 19, 20

HERMAN B. WELLS, BEING LUCKY: REMINISCENCES AND REFLECTIONS (Bloomington: IUP, 1980) 7

INTEREST OF INDIANA UNIVERSITY

Indiana University is a public school.[1] It educates undergraduate students and offers postgraduate education through two Schools of Law, at Bloomington and at Indianapolis, the School of Medicine, and its Graduate School and various professional schools, including the Kelley School of Business. The University exercises academic discretion to decide which applicants to admit as students. Indiana University considers the diversity of its student body — as defined by a wide range of characteristics in which students differ from one another — an essential component of its academic mission.

Indiana University School of Law — Bloomington ("IU School of Law") admits students through a process in which each applicant is evaluated as a whole. In addition to quantitative academic data, the IU School of Law considers the racial characteristics of applicants, as but one of many other differentiating characteristics, in order to achieve the diverse student body it considers critical to meeting its specific academic mission as a law school.

In the process of seeking a diverse student body, the IU School of Law (like Indiana University as a whole) has relied on the judgment rendered in *University of Cal. Regents v. Bakke*, 438 U.S. 265 (1978), that consideration of race as a factor in admissions decisions by public universities is not *per se* unconstitutional, and other decisions of this Court

---

1. Neither party in this case nor its counsel authored this brief in whole or in part, and no person or entity other than Indiana University made any monetary contribution to its preparation or submission. The parties filed their consent in December 2002 to the filing of *amicus* briefs in support of either party.

which hold that any consideration of race by government-funded entities must be necessary and compelling pursuant to the Equal Protection Clause. During the decades of experience since *Bakke*, IU School of Law has developed an admissions process that complies with those exacting constitutional demands and simultaneously preserves the discretion necessary to identify and meet the demands of its academic mission. If this Court were to adopt Petitioner's arguments — contrary even to the Government's position — that a government-funded university's consideration of race in seeking diversity can never be constitutional, *see* Pet'r Br. at 15-16, 22, IU School of Law's discretion to admit a student body it considers best suited to meeting its academic mission would be greatly constrained and its admissions process would be compromised, to the detriment of the School, its students, the State of Indiana and its bar associations.

STATEMENT

The Admissions Committee at IU School of Law, composed primarily of faculty members, considers each applicant's file as a whole. Over time, the Committee has concluded that Law School Aptitude Test ("LSAT") scores and undergraduate grade point averages ("GPA") are important indicators in predicting how an applicant will succeed in law school. Accordingly, it relies heavily on those two qualifications in making the vast majority of its admission decisions. The faculty Admissions Committee has also concluded, based on its past experience, that certain other factors must be considered in the review of applicant files to effect a meaningfully diverse student body. These factors include geography, viewpoint, undergraduate school and field of study, work and graduate school experience, participation

in community services and campus life, economic background, potential for service to the profession, military service, and race and ethnicity.[2]

The faculty Admissions Committee evaluates the application of an applicant based on the reviewer's response to the entire file. No single non-academic factor is determinative or is necessarily given greater weight than any other. There is no target number of offers nor a target goal of enrollments for students with the considered factors, and there are no quantitative values added for any particular characteristic, including race. Further, the faculty Admissions Committee does not evaluate how many minorities or other category of students have outstanding offers or have accepted admission to the school in evaluating subsequent applications for the same school year. Instead, each applicant is evaluated on the merits of his or her application as a whole.

SUMMARY OF ARGUMENT

This Court has recognized that the academic and associational freedoms protected by the First Amendment have vested faculty admissions committees with substantial discretion to devise admissions policies. IU School of Law has determined that a diverse — including racially diverse — student body is an important part of its effort to provide the highest quality education possible in order to serve the professional community and legal client base in Indiana, and thereby to compete with other law schools. As set forth in

---

2. The Indiana University School of Law — Indianapolis and the Indiana University School of Medicine also have race-conscious admissions processes. Unless otherwise noted, the facts in this brief refer only to the Indiana University School of Law — Bloomington.

Bakke, pursuit of that interest is constitutionally permissible, subject to "rigid scrutiny." The admissions policies of IU School of Law pass that test.

The School does not reserve seats or set targets for any particular racial or ethnic groups of applicants, and the faculty Admissions Committee's consideration of race as a factor is narrowly tailored. Race is considered only as part of an array of other considerations, none of which is determinative of whether the applicant will be admitted, and none of which has a quantitative value. Moreover, the Admissions Committee does not segment the offers it makes with respect to any non-academic characteristic.

The faculty Admissions Committee has significant experience in the complex and dynamic process of enrolling the students best suited to meet the School's educational mission. The Committee has relied upon this Court's decisions about consideration of race to craft a process that conforms with the requirements of the Equal Protection Clause while retaining the constitutionally permissible and necessary discretion to achieve its academic goals. *Bakke* has long provided an analytical framework by which to adjudicate those admissions policies no less strictly than required by the First and Fourteenth Amendments. Faculty admissions committees at IU School of Law and elsewhere require substantial latitude in defining admissions policies and applying permissible, competitive admissions factors they consider essential to their unique academic missions. It is precisely because the constitutional analysis of such admissions policies is difficult and individualized that this Court should affirm *Bakke*.

ARGUMENT

I. THE INTEREST OF GOVERNMENT-FUNDED SCHOOLS IN THE DIVERSITY OF THEIR STUDENT BODY IS CONSTITUTIONALLY FURTHERED BY THE COMPETITIVE CONSIDERATION OF RACE AND ETHNICITY IN ADMISSION DECISIONS.

Amicus enthusiastically agrees with the foundational principle running throughout Equal Protection jurisprudence: "Racial and ethnic distinctions of any sort are inherently suspect and thus call for the most exacting judicial examination." *Bakke*, 438 U.S. at 291 (opinion of Powell, J., joined by White, J.); *see also Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 225-27 (1995). That is not to say that all such distinctions are unconstitutional. "It is to say that courts must subject them to the most rigid scrutiny." *Bakke*, 438 U.S. at 291 (citation omitted). Under the scrutiny appropriate to university admissions processes, the interest of Indiana University in "obtaining the educational benefits that flow from an ethnically diverse student body" is "substantial enough" that its use of race as one among many factors in admissions passes constitutional muster. 438 U.S. at 306.

A. *The Interest of IU School of Law in Diversity Is Constitutionally Protected.*

The "attainment of a diverse student body . . . is clearly a constitutionally permissible goal for an institution of higher education." *Bakke*, 438 U.S. at 311-12 (opinion of Powell, J.).[3]

3. Although supported by a fragmented array of opinions, this Court's judgment in *Bakke* is at least clear in its reversal of the state (Cont'd)

A university's interest in the diversity of its student body is *sui generis*, arising from an interplay of the First and Fourteenth Amendments. The protected academic and associational freedoms that are presented in admissions cases significantly differentiate this case from the commercial and employment cases where courts have restricted race-conscious activities by government-funded actors to remediating past discrimination. *See Brewer v. W. Irondequoit Cent. Sch. Dist.*, 212 F.3d 738, 750-51 (2d Cir. 2000).[4] These First Amendment constitutional rights and freedoms have

(Cont'd)
supreme court's judgment that forbade the school "from according any consideration to race in its admissions process." 428 U.S. at 272. The premise for that portion of the judgment was the recognition by five Justices that "the State has a substantial interest that legitimately may be served by a properly devised admissions program involving the competitive consideration of race and ethnic origin." *Id.* at 320; *see also id.* at 361-62 (opinion of Brennan, White, Marshall, and Blackmun, JJ.); *Smith v. Univ. of Wash. Law Sch.*, 233 F.3d 1188, 1200-01 (9th Cir. 2000), *cert. denied*, 532 U.S. 1051 (2001).

4. *See also, e.g., Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 286 (1986) ("[A]lthough its precise contours are uncertain, a state interest in the promotion of racial diversity has been found sufficiently 'compelling,' at least in the context of higher education, to support the use of racial consideration in furthering that interest. And certainly nothing the Court has said today necessarily forecloses the possibility that the Court will find other governmental interests which have been relied upon in the lower courts but which have not been passed on here to be sufficiently 'important' or 'compelling' to sustain the use of affirmative action policies.") (O'Connor, J., concurring in part and concurring in the judgment) (citations omitted); *cf. Hunter v. Regents of Univ. of Cal.*, 190 F.3d 1061, 1064 (9th Cir. 1999) (state has compelling interest in race-conscious admissions process for school oriented to research for improving education in urban public schools).

long vested school authorities with such "broad power to formulate and implement educational policy" that the use of non-remedial, race-conscious policies is "within the broad discretionary powers of school authorities" even if such policies may not be imposed by federal courts without a finding of specific past discrimination. *See Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 16 (1971). "Universities . . . may make individualized decisions, in which ethnic background plays a part, under a presumption of legality and legitimate educational purpose. So long as the university proceeds on an individualized, case-by-case basis, there is no warrant for judicial interference in the academic process." *Bakke*, 438 U.S. at 319 n.53.[5]

To deny law schools the exercise of their academic discretion would unduly burden their ability to train lawyers for our pluralistic society. Law schools compete with one another for students, faculty and opportunities to place their

5. In circumstances which have implicated its academic interest in diversity, Indiana University appropriately has taken such voluntary, race-conscious action within the constitutionally recognized scope of its academic discretion even without a judicial or legislative finding of past violations of the Equal Protection Clause. For example, as recounted by its past President: "One of the most time-consuming and important responsibilities relating to students that occurred during my administration involved the effort to shake off our previous university practices that discriminated against Black students — in essence, to make Black students full-fledged members of the university community." HERMAN B. WELLS [former President of Indiana University], BEING LUCKY: REMINISCENCES AND REFLECTIONS 214 (Bloomington: IUP, 1980); *see also id.* ("The denial of the men's swimming pool in the old gymnasium had to be handled in [this] fashion. It had long been the practice of the football coaches to welcome Black players, some of whom became relatively famous. This provided my cue. . . . ").

graduates with employers. Out of that competition, law schools have developed distinct academic missions. Some emphasize public service, some emphasize public policy, and others emphasize clinical education, professional skills training or interpersonal abilities. Meeting those different competitive missions would be frustrated by a judicially-imposed formula that would essentially homogenize all admissions decisions. Law school faculty admission committees must retain substantial latitude to devise admissions policies tailored to their unique academic missions, and to weigh individual applicant files accordingly.

The United States agrees that universities have "substantial latitude" in ensuring diversity of their student bodies. Br. for U.S. as *Amicus Curiae* Supp. Pet'r at 13 (Jan. 2003) [hereinafter "Gov't Br. at __"]. Further, the United States is not seeking to overturn *Bakke*, *see id.*, at 12 n.4; it acknowledges that proper consideration of race in university admissions is constitutionally permissible, *see id.* at 9 (noting the Equal Protection Clause "demands that any use of race be otherwise carefully calibrated and narrowly tailored").

The admissions practices of IU School of Law are constitutional under prevailing law and are in every constitutional sense entirely distinct from the admissions programs struck down in *Bakke* and other cases. The school "relies heavily" on LSAT scores and undergraduate GPAs, "but not to the exclusion of other factors."[6] These "other factors" include "undergraduate school, rigor of coursework, letters of recommendation, graduate work, employment, extracurricular activities, potential for service to the

6. Admission Quick Start <http://www.law.indiana.edu/prospective/quick.shtml> (last visited Feb. 16, 2003).

profession, education/geographic/socioeconomic diversity, and the applicant's personal statement,"[7] as well as participation in community service and campus life, military service, ethnicity, and race. None of the non-academic factors is given priority over any other, and no student is considered on a separate track or within a separate classification related to any of the non-academic factors. Applicants are not awarded points or other numeric values for any factor, and there is no goal to admit a certain number or percentage of people with particular characteristics. Each applicant's file is read and evaluated holistically based on all considerations, and each applicant has an equal chance, based on non-academic factors, to compete for a seat in the school. The IU School of Law admissions policy, in short, seeks precisely the kind of "diversity that furthers a compelling state interest" because it "encompasses a far broader array of qualifications and characteristics of which racial or ethnic origin is but a single though important element." *Bakke*, 438 U.S. at 315.

This individualized treatment, with each seat equally available to every applicant and allocated through a competitive evaluation of each applicant, is the hallmark by which the constitutionality of the admissions process of IU School of Law is to be recognized.

> The applicant who loses out on the last available seat to another candidate receiving a 'plus' on the basis of ethnic background will not have been foreclosed from *all* consideration for that seat *simply* because he was not the right color or had

7. *Id.* These are precisely the kinds of factors the government cites as "entirely appropriate" considerations in achieving diversity. Gov't Br. at 14, 17.

> the wrong surname. It would mean only that his combined qualifications, which may have included similar nonobjective factors, did not outweigh those of the other applicant. His qualifications would have been weighed fairly and competitively, and he would have no basis to complain of unequal treatment under the Fourteenth Amendment.

Bakke, 438 U.S. at 318 (emphasis added). The "measure of competition among all applicants" during IU School of Law's admissions process provides the necessary "constitutional distinction" between its practices and those that should be invalidated under the exacting scrutiny required by the Equal Protection Clause. 438 U.S. at 319, n.53.

Constitutional infirmities that have invalidated other admissions programs are entirely absent from the admissions process at IU School of Law. The program in *Bakke* was "undeniably a classification system based on race and ethnic background," which reserved a specified number of seats for which only identified minorities could compete, resulting in a "limitation" reducing the seats for which non-minorities could compete. 438 U.S. at 289.[8] Other programs which have been ruled unconstitutional have also assigned numbers for admissions by race. *See, e.g., Eisenberg v. Montgomery*

8. The admissions program at issue in *Bakke* set aside 16 seats out of 100 for members of racial minorities, "a number prescribed by faculty vote." 438 U.S. at 275, *see also id.* at 279. "It prefer[red] the designated minority groups at the expense of other individuals who [we]re totally foreclosed from competition for the 16 special admissions seats," *id.* at 305, and was "designed to assure the admission of a specified number of students from certain minority groups," *id.* at 269-70.

County Pub. Sch., 197 F.3d 123, 131 (4th Cir. 1999) (holding invalid as "racial balancing" the denial of a student's transfer request on the basis of student's race and reserving question of whether diversity is a compelling state interest), *cert. denied*, 529 U.S. 1019 (2000); *Hopwood v. State of Tex.*, 78 F.3d 932, 937 (5th Cir.) (invalidating admissions policy that set lower threshold LSAT and GPA composite scores for certain minorities to meet "aspiration" of admitting class of 10% Mexican Americans and 5% blacks), *cert. denied*, 518 U.S. 1033 (1996). In contrast, the admissions process at IU School of Law does not "reserve," aim for, set as a goal, or otherwise seek any "number" of seats or even a "critical mass" for any racial or ethnic minority group. The admission process struck down in *Bakke* "consisted of a separate admissions system" for identified minorities, pursuant to which "special candidates did not have to meet" the school's otherwise applicable "grade point average cutoff applied to regular applicants." 438 U.S. at 272-73, 275. Whereas in *Bakke*, the admissions committee members "did not rate or compare the special candidates against the general applicants," *id.* at 275, IU School of Law "does not insulate the individual from comparison with all other candidates for the available seats." *See id.* at 317; *see also id.* at 279, 319-20.

B. *Consistent Minority Enrollment, Standing Alone, Does Not Constitute or Prove the Use of a De Facto Quota.*

The United States argues that Respondent's admissions policy operates as a *de facto* quota system, based largely on Respondent's consideration of "critical mass"[9] and the

9. Michigan's consideration of "critical mass" reflects Justice Powell's discussion in *Bakke* of the Harvard admissions plan, which

(Cont'd)

Government's view that the law school's enrollment of between 44 and 47 minority students each year from 1995 to 1998 shows a "remarkable degree of consistency." Gov't Br. at 22, 27, 28. Putting aside its convenient disregard of enrollment data from other years, the Government confuses effect with cause.

The Government's effects-based argument rests on the faulty premise that a permissible race-conscious, non-quota admissions policy could not yield stable results. *Id.* at 29. Stable outcomes can result from ordinary competitive processes or completely random processes. Notably, as the Government itself points out, between 3% and 4% of the enrolled freshman in each of the last six years were African Americans under the admissions system in Texas that does not consider race at all. *See* Gov't Br. at 15. In short, stability of admissions results alone proves nothing with respect to the constitutionality of an admissions process.

The positions of Petitioner and the Government also fail to account for the complex realities of a law school's admissions process. It is an interrelated, competitive process affected not only by the school's decisions, but also independent, individual decisions made by the potential students and by other law schools. IU School of Law does not control the admissions decisions of its competitors, nor does it control

---

(Cont'd)
expressly recognizes that enrolling only a few of certain types of students will not achieve the educational diversity valued and permitted by the First Amendment, and may instead create a sense of isolation among such students and thereby impede their development. *See Bakke*, 428 U.S. at 316-17; *id.* at 323-24 ("[I]f Harvard College is to provide a truly heterogen[e]ous environment that reflects the rich diversity of the United States, it cannot be provided without some attention to numbers.").

the acceptance decisions of those to whom it extends offers. Potential students base their enrollment decisions on a combination of externalities unique to their personal circumstances, including, for example, the relative distances of prospective schools from their homes or significant others, and the comparative price tags of prospective schools. In addition, law schools vigorously compete with each other to attract the students most able to contribute to the classroom community and the community at large. They also compete with each other to create the best learning environment, including one with meaningful diversity, and to attract potential employers to interview and hire their students. Because applicants generally apply to more than one law school and the competition for top students is intense, a law school can never be certain how many of the students it admits will enroll. There is significant variation each year in the number of: spaces available, offers the school believes it must extend to fill those spaces, students who apply, and students who enroll. For these reasons, among others, and as the Government acknowledges, schools cannot accurately predict acceptance rates. *See* Gov't Br. at 22.

II. IU SCHOOL OF LAW REQUIRES THE DISCRETION PERMITTED BY *BAKKE* TO MEET ITS ACADEMIC MISSION.

The IU School of Law admissions process is complex and dynamic, and necessarily so. Any blanket prohibition on race-sensitive admissions would frustrate a time-tested process built in reliance upon the flexibility permitted by *Bakke*, and replace it with a blind judicial ideal detached from the realities of the law school environment. Such inflexibility would ultimately defeat the school's compelling interest in diversity.

A. *Courts Should Not Substitute Their Judgment in the Place of Lawful Decisions by Faculty Admissions Committees.*

This Court has recognized that one of the "four essential freedoms" for a University is to determine "who may be admitted to study." *See Bakke*, 438 U.S. at 312 (opinion of Powell, J.) (quoting *Sweezy v. New Hampshire*, 354 U.S. 234, 263 (1957)). This academic freedom, which "long has been viewed as a special concern of the First Amendment," *id.*, "thrives not on only the independent and uninhibited exchange of ideas," but also "on autonomous decisionmaking by the academy itself." *Regents of Univ. of Mich. v. Ewing*, 474 U.S. 214, 226 n.12 (1985). The United States agrees that "[p]ublic universities have substantial latitude" to ensure "that student bodies are experientially diverse and broadly representative of the public." Gov't Br. at 13. Abolishing the race-conscious admissions policies under which schools have operated in reliance upon *Bakke* would unduly impede IU School of Law's ability to serve the educational needs of its students and the expectations of those that recruit at the school and to compete with other law schools.[10]

10. This reliance alone is a substantial reason why this Court should not strike down *Bakke* even if the Court invalidates the particular admissions policies used by Respondent. *See, e.g., Planned Parenthood of Southeastern Penn. v. Casey*, 505 U.S. 833, 855-56 (1992) ("The Constitution serves human values, and while the effect of reliance on *Roe* cannot be exactly measured, neither can the certain cost of overruling *Roe* for people who have ordered their thinking and living around that case be dismissed."); *see also Smith*, 233 F.3d at 1200 (*Bakke* is "clear enough to permit educators to rely upon the opinion that gave the decision its life and meaning"); *Brewer*, 212 F.3d at 751 (refusing to hold that non-remedial reduction of *de facto*

(Cont'd)

Law schools are uniquely situated to determine the optimum mix of students to create the most educationally beneficial environment for their particular academic mission and niche in the market for legal education. Although universities' faculty admissions committees cannot and do not seek to replace judicial authorities as tribunals for deciding how to weigh constitutional rights of individuals, they do possess — and should be allowed to continue to exercise discretion to act upon — expertise in articulating, and formulating policies to achieve, their academic mission, including whether racial and other differences contribute to the education of students. Federal courts are not well suited "to evaluate the substance of the multitude of academic decisions that are made daily by faculty members of public educational institutions — decisions that require 'an expert evaluation of cumulative information and [are] not readily adapted to the procedural tools of judicial or administrative decisionmaking." *Ewing*, 474 U.S. at 226 (quoting *Bd. of Curators of Univ. of Mo. v. Horowitiz*, 435 U.S. 78, 89-90 (1978)). That task is best left to professional educators' "individualized, case-by-case" decisions concerning who will contribute most to the educational process, and who will be the most successful in using what they have learned for the benefit of society. *Bakke*, 438 U.S. at 319 n.53.

The assumption made by critics of affirmative action that minorities admitted under race-conscious admissions policies are (or will be perceived as) somehow less "qualified" demonstrates a misunderstanding about who is best "qualified"

(Cont'd)

segregation in public schools is not a compelling state interest in part because prior cases "establish the principle under which New York State has functioned for decades" and "such integration serves important societal functions").

to attend a law or other graduate school. Although standardized tests and undergraduate performances are important factors in determining who will most benefit from and contribute to the study of law, other factors, as the United States concedes, *see* Gov't Br. at 14, 19-20, can also be taken into account. Determining the most "qualified" mix of students to enrich the learning environment for the entire school is a complex decision best left to the discretion of the University.

B. *IU School of Law's Admissions Process Is Narrowly Tailored To Achieve Diversity.*

The IU School of Law strives to bring in a diverse class of law students each year and has devised an admissions process narrowly tailored to effect this diversity. The school pays primary attention to academic qualifications and, consistent with *Bakke*, considers race as only one of many different factors. Each applicant's file is read individually and evaluated based on the applicant's academic qualifications, and the presence of any additional factors in the file, with the whole person in mind.

Military service, like race, is one factor the faculty Admissions Committee may consider in evaluating applicant files. The Committee has determined that having students with military service is beneficial for all students. Based on admissions experience, the Committee has concluded that students with military service records would not be meaningfully present at the school absent consideration of those records as a factor in admissions.[11] The IU School of

11. Thirty years ago, the classrooms were full of returning veterans, and diversity might have been better served by a different criterion at that time.

Law does not reserve a certain number of spaces for or make a set number of offers to individuals who have served in the military.

The faculty Admissions Committee considers race in the same way, because the Committee has concluded that having students of color is beneficial for all students, and because minorities would not be meaningfully represented at the school based on other factors alone. The Committee considers each individual and ultimately either accepts or rejects them on their own merits.

The IU School of Law's consideration of race in admissions is narrowly tailored because the faculty Admissions Committee will consider race (and all other separately-identified factors) only to the extent necessary in any given year and only as long as the School would not enroll a meaningfully diverse student body otherwise. That time, however, has not yet come, and the IU School of Law must continue to consider race in its admissions process or fail in its goal to create the sufficiently diverse student body best suited to meeting its academic mission.

C. *Race-Neutral Admissions Policies Would Fail to Meet the School's Compelling Interest in Diversity.*

Critics of race-conscious admissions programs, including the Government, claim that meaningful diversity can be achieved through race-neutral means. No one, however, has advanced a workable race-neutral solution to create a diverse student body in post-graduate schools.

The primary race-neutral alternative advanced by the Government — guaranteeing admission to the top students

of all high schools in the state based on the Texas, Florida and California models, *see* Gov't Br. at 17-18 — clearly would not work in the context of law and other graduate schools. Most law schools recruit students on the national or even international level. It would not be practical for a law school to guarantee admission to all college students graduating in the top of their undergraduate class.

The other alternative propounded by the Government, relying solely on race-neutral factors such as geography or economics, *see* Gov't Br. at 17, would not adequately address the need for racial diversity. To the extent race-neutral admissions criteria are a proxy to admit members of minority groups, they are far less narrowly tailored to the compelling interests of racial diversity than open race-conscious admissions policies. And if this Court strikes down *Bakke* and race-neutral criteria fail to create a meaningfully diverse student body, the hands of the admissions authorities would be tied to correct it.

III. THE DIVERSITY FURTHERED BY IU SCHOOL OF LAW'S ADMISSIONS POLICY CONFERS SIGNIFICANT BENEFITS UPON ITS STUDENTS, THE BAR, AND THE STATE.

In considering its academic mission, IU School of Law must focus not only on the quality of the educational experience it provides to its students, but also on meeting the needs of the profession its students will enter. As this Court recognized decades ago:

> [A]lthough the law is a highly learned profession, we are well aware that it is an intensely practical one. The law school, the proving ground for legal

> learning and practice, cannot be effective in isolation from the individuals and institutions with which the law interacts. Few students and no one who has practiced law would choose to study in an academic vacuum, removed from the interplay of ideas and the exchange of views with which the law is concerned.

Sweatt v. Painter, 339 U.S. 629, 634 (1950) (quoted in *Bakke*, 438 U.S. at 314). As the start of the school's academic process, its admissions policy has both objectives in mind. The School's success in admitting, enrolling and graduating diverse student bodies has conferred significant benefits upon the school's students, the state bar, and the State of Indiana.

The brief filed below on behalf of the American Council on Education discussed in detail the research findings that confirm the educational value of racial and ethnic diversity.[12] These benefits are particularly valuable in law schools like IU School of Law, which trains its students to test their assumptions and examine issues from different viewpoints. *See generally*, Gary Orfield & Dean Whitla, *Diversity and Legal Education: Student Experiences in Leading Law Schools, in* DIVERSITY CHALLENGED: EVIDENCE ON THE IMPACT OF AFFIRMATIVE ACTION 143-174 (Gary Orfield & Michal Kurlaender eds., 2001).[13]

---

12. *See* Brief of *Amici Curiae* American Counsel on Education, *et al.* at 22-25, *Grutter v. Bollinger*, 288 F.3d 732 (6th Cir. 2002) (No. 01-1447).

13. As articulated by a law student in the Orfield and Whitla study: "'Being confronted with opinions from different socioeconomic and ethnic realms forces you to develop logical bases

(Cont'd)

Diversity in legal education is not an objective set only by the Law School — it is public policy in the State of Indiana. The state legislature, at the encouragement of the Chief Justice of the Indiana Supreme Court, passed in 1997 a bill establishing the Indiana Conference for Legal Education Opportunity ("CLEO").[14] The law itself seeks diversity in the state's law schools and legal community; its legislative purpose is "to assist Indiana minority, low income or educationally disadvantaged college graduates in pursuing a law degree and a career in the Indiana legal and professional community." Ind. Code § 33-2.1-12-2 (1997). In 1999, the legislature affirmed and strengthened its commitment to diversity by increasing annual state funding of the program. *See id.* § 33-2.1-12-7.

Part of the academic mission of Indiana University is to respond to the demands of the State, nation and those who hire its graduates, a demand that increasingly requires experience in understanding and cooperating with members of various racial and ethnic groups. The ever increasing nature of the demand has been judicially recognized for decades. *See, e.g., Bakke*, 438 U.S. at 292; s*ee also id.* at 304-05 n.42 (characterizing *Morton v. Mancari*, 417 U.S. 535 (1974), as upholding "hiring preference for qualified Indians in the Bureau of Indian Affairs" as "not racial at all, but 'an employment criterion reasonably designed to further the

(Cont'd)

for the opinions you have and to discard those not based on such logic. You simply are forced to think more critically about your opinions when you know that people with differing opinions are going to ask you to explain yourself.'" Orfield & Whitla, at 160.

14. Indiana Judicial System, <http://www.in.gov/judiciary/cleo/history.html (last visited Feb. 17, 2003).

cause of Indian self-government and to make the BIA more responsive to the needs of its constituent . . . groups. . . ."").

Bar associations in Indiana also actively seek diversity in law schools and the legal profession. Just last month the Indianapolis Bar Association ("IBA") passed a Diversity Resolution emphasizing the importance of diversity among the area's legal community in promoting justice and enhancing the legal profession. Accordingly, the Resolution declared "that diversity is a core value of the IBA, and that the IBA shall promote and encourage diversity among its leadership, its membership, and the entire community."[15] Similarly, the Indiana State Bar Association ("ISBA") has created a standing committee on Racial Diversity in the Legal Profession, the purpose of which "is to recruit and assist minority law students, and to seek all opportunities for participation in the ISBA by minority lawyers."[16] As the express positions of such organizations confirm, private employers who consider interviewing at the School demand diversity, and to the extent that this demand can be met by IU School of Law, it benefits all students of the school who seek employment.

In furthering diversity through its admissions program, IU School of Law both confers substantial benefits upon its students and responds to expectations of the State, the legal community and employers who recruit the school's graduates.

15. Sherri Massa, *Bar Affirms Diversity as Core Value*, <http://www.indybar.org/newslettermain.cfm?ID=132> (last visited Feb. 14, 2003).

16. Indiana State Bar Association, <http://www.inbar.org/content/commitees/standing/oppminorities.asp> (last visited Feb. 16, 2003).

Because a diverse student population fosters a learning environment not of "'isolation from the individuals and institutions with which the law interacts,'" *Bakke*, 438 U.S. at 314 (quoting *Sweatt*, 339 U.S. at 634), but of broad diversity to encourage the exchange of ideas and sharpen critical thinking, diversity best prepares students for the practice of law in a diverse society. The benefits derived from educational diversity at the IU School of Law in turn yield additional benefits for the state's legal community and justice system.

CONCLUSION

Petitioner overstates the controversy before this Court, arguing that *Bakke* no longer comports with this Court's "articulated standards on compelling-interest analysis" and a law school's "interest in diversity" can never be constitutionally furthered through any consideration of race or ethnicity in the admissions process. Pet'r Br. at 16-17. This Court's decades-long and painstaking articulation and adjudication of admissions policies is disserved by such a facile summary. More importantly, our Constitution cannot be so simplified because it mandates that the rights, freedoms, and interests of the persons making and affected by admissions decisions be analyzed on an individual basis. *Bakke* has long provided this Court, the judiciary, legislatures, universities, and students with an analytical framework to scrutinize and adjudicate those admissions policies no less strictly than required by the First and Fourteenth Amendments. It is precisely because the constitutional analysis is difficult and individualized that this Court and the judiciary should, indeed must, retain *Bakke*.

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

DOROTHY J. FRAPWELL
University Counsel
INDIANA UNIVERSITY
Bryan Hall 211
107 South Indiana Avenue
Bloomington, IN 47405-7000
(812) 855-9739

PATRICK LOUIS BAUDE
LAUREN K. ROBEL
JEFFREY EVANS STAKE
INDIANA UNIVERSITY SCHOOL OF LAW – BLOOMINGTON
211 South Indiana Avenue
Bloomington, IN 47405-7001
(812) 855-8885

JAMES FITZPATRICK
Counsel of Record
JAMES L. COOPER
MICHAEL R. GESKE
ELISSA J. PREHEIM
KENDALL MILLARD
ARNOLD & PORTER
555 Twelfth Street, N.W.
Washington, DC 20004-1206
(202) 942-5000

Counsel for Amicus Curiae